In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1394

THE CALIFORNIA HIGHWAY COMMISSION, ET AL., PETITIONERS

v.

LA RAZA UNIDA OF SOUTHERN ALAMEDA COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT[1]

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to a request by this Court on August 17, 1972, that the United States express its views. The question presented is whether this Court should grant certiorari before judgment by the court of appeals to review the issuance of a preliminary injunction blocking a state highway project. On the merits, the issue is whether a State should be required to comply with Sec-

[1] The petition asks for a writ of certiorari to the United States District Court for the Northern District of California. However, an appeal has been docketed in the court of appeals, and the writ would properly issue to that court.

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tion 4(f) of the Department of Transportation Act of 1966, 80 Stat. 931, 934, as amended, 49 U.S.C. 1653(f); Section 18(a) of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. 138; and the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. 4321, where the sole federal participation in the project has been grant of location approval by the Federal Highway Administration, which took place prior to the enactment of those statutes, and where no federal funds have been committed to the project.

1. This is a class action against federal and state defendants for declaratory and injunctive relief in regard to California State Project 238, a proposed 14-mile highway from Interstate Route 680, near Mission San Jose, to Interstate Route 580, north of Hayward, California. The highway would pass through Hayward, Union City, and Fremont, California. It is proposed as part of the Federal-Aid Primary System, for which money is available on a 50–50 state-federal sharing basis.

Under 23 U.S.C. 103, various stages of federal approval of a project must occur before federal funding can be granted. The first step is system approval. The second is location approval, which establishes the routing within the previously defined system corridor. Prior to location approval the state must hold a public hearing. In this case, public hearings on the overall route location were held on November 14, 1960, and April 14, 1961. Hearings for the portion in Fremont and Union City were held on September 29, 1965, and April 20, 1967, respectively (Pet. App. A, pp. i–ii).

Federal location approval for Route 238 was given by the Federal Division Engineer for California on November 4, 1966. If the highway is to become a federally aided project, state highway officials must still obtain federal design approval; plans, specifications and estimate (P, S and E) approval; and construction approval. The State has not requested or obtained any federal funds for the project but has, with its own funds, acquired land in the project right-of-way. This has occurred predominantly in Hayward, where 30–40 percent of the necessary land has been acquired. As a result, persons residing on the right-of-way have been encouraged to leave. There is a dispute as to the number of people who have left as "voluntary relocatees" (*id.* at iii).

A hearing was held on plaintiffs' motions for a preliminary injunction and on the federal and state defendants' motions to dismiss in late September 1971. On November 9, 1971, the court filed a memorandum and order holding as follows (*id.* at xi):

> The court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations.

The district court based this ruling on two considerations: congressional policy statements expressing concern about highway-created displacement and environmental protection, including their legislative histories; and the language of the statutes and regulations themselves, which in the court's view indicates that they apply to federal-aid projects before money has been appropriated and as early as location approval (*id.* at xiv–xx).

The court then held that Sections 205 and 210 of the Uniform Relocation Assistance Act of 1970, 84 Stat. 1894, 42 U.S.C. 4625, 4630; Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f); Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, and various supporting statutes and regulations apply against the state and federal defendants. Further, it held that the State's relocation assistance program is inadequate to meet the requirements of Section 205 of the Uniform Relocation Assistance Act of 1970 and those of DOT Instructional Memorandum 80–1–71, and that a preliminary injunction should issue for these violations (Pet. App. A, pp. xxiv–xxv). In regard to environmental regulations, the court held that the Route 238 project "will have a most significant impact on the environment" and "will probably cut through three parks" (*id.* at xxv). Therefore, the court found that a "§ 4(f) statement" (49 U.S.C. 1653(f)) concerning injury to parklands is required for Project 238 at its present state of development and that no more land should be acquired nor action be undertaken which would materially affect the environment until such statements have been prepared and

the Secretary of Transportation is satisfied that (1) no feasible alternative route exists and (2) any harm to the environment has been minimized (Pet. App. A, pp. xxvi–xxvii).

By preliminary injunction filed November 9, 1971, the state defendants were enjoined from acquiring any further real property, moving residents or undertaking any action which would affect the environment in connection with the project (*id.* at xxviii–xxix). The injunction specifies that a motion for its termination may be made upon a showing of compliance with the various statutes and regulations involved. The preliminary injunction apparently restrains the state defendants from continuing the project even if the State irrevocably commits itself to proceed without federal assistance. However, the memorandum and order of the district court states (*id.* at p. xx, n. 5):

> * * * The court believes it is unnecessary to consider at this time whether the federal protective devices would continue to apply if the State forecloses the possibility of federal assistance. * * *

2. We do not believe that this is a suitable case for utilization by this Court of the extraordinary procedure of certiorari before judgment in the court of appeals. Rule 20 specifies that such review is limited to cases of "imperative public importance," and the very limited use that has historically been made of this power manifests the Court's reluctance to disrupt normal appellate processes. Such review has been reserved for cases such as the President's seizure of the steel industry, *Youngstown Co.* v. *Sawyer,* 343

U.S. 579, and the wartime saboteurs case, *Ex Parte Quirin,* 317 U.S. 1. This case is not of that magnitude of importance and is otherwise inappropriate for review before judgment in the court of appeals for the following reasons:

(a) The particular subject matter of the instant litigation is not of overwhelming urgency. The highway project has been in the planning stage for at least twelve years, and the additional delay entailed in obtaining a decision in the court of appeals would not appear critical.

(b) It is not clear that a decision in this case would decisively answer the general question of when a state highway project becomes irrevocably subject to federal requirements protecting displaced individuals and the environment. The particular circumstances of this case involve special equities favorable to the State (see point 3, *infra*), and there is no indication that a significant number of projects throughout the country are so similar on their facts to the situation here that they are likely to be controlled by a decision in this case.

(c) Because California has not irrevocably committed itself to renunciation of federal funding for this project, the district court did not clearly resolve whether under its decision the limited federal involvement here present, combined with such a renunciation, would relieve the State of the duty of meeting federal requirements (Pet. App. A, p. xx, n. 5).

(d) At the time of the filing of the present petition, there was pending before this Court a certiorari peti-

tion in a case raising similar issues, *Texas Highway Department* v. *Named Individuals,* No. 71–1198. In that case the court of appeals for the Fifth Circuit held (446 F.2d 1013) that a highway project that had been commenced with federal funds could not be withdrawn from federal participation (and requirements) by being completed with state funds only. This Court will on occasion grant certiorari before judgment when a case raises issues identical or closely related to those presented in another case pending before it (*e.g., Taylor* v. *McElroy,* 358 U.S. 918, 360 U.S. 709, 710; *Porter* v. *Dicken,* 328 U.S. 252, 254), but that possible basis for certiorari before judgment in the present case was eliminated when the Court denied certiorari in *Texas Highway Department* on May 15, 1972 (406 U.S. 933).[2]

3. With regard to the merits, the interests of the United States are not directly affected by the determination of whether or not California should be allowed to "go it alone" at this stage.[3] However, it is our view that on the facts of this case California should be allowed to withdraw from and permanently foreclose federal participation in this project. Here California obtained location approval, thereby acquiring federal status for the project under the decision in this case, prior to the enactment of the relevant

[2] As petitioners (Pet. 16–17) and the district court (Pet. App. A, p. x) note, the two cases differ significantly on their facts, because of the extensive federal participation in the Texas project.

[3] The United States, accordingly, has not appealed from the district court's decision.

statutes. It appears inequitable that, by obtaining location approval, California should be bound to an election it did not know it was making, did not know would be irrevocable, and the legal consequences of which had not yet been enacted. Therefore, California, if it wishes, should be allowed to proceed on its own with the project—an avenue now apparently foreclosed by the district court's preliminary injunction.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

GEORGE R. HYDE,
LARRY G. GUTTERRIDGE,
Attorneys.

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